IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No 823 of 2000
in
FIRST APPEALNo 564 of 2000
with
LETTERS PATENT APPEAL No 150 of 2001
in
FIRST APPEAL No 779 of 2000

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

SANJAY RATANSING THACKER

Versus

ARIHANT TRADE LINK

Appearance:

1. LETTERS PATENT APPEAL No. 823 of 2000
PARTY-IN-PERSON for Appellant No.
MRS KETTY A MEHTA for Respondent No. 1
MR GIRISH D BHATT for Respondent No. 2

2. LETTERS PATENT APPEAL No. 150 of 2001
PARTY-IN-PERSON for Appellant No.

MR GIRISH D BHATT for Respondent No. 1
RULE SERVED for Respondent No.2.

CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE D.A.MEHTA

Date of decision: 18/12/2003

COMMON JUDGEMENT

(Per : HON'BLE MR.JUSTICE D.A.MEHTA)

1 These appeals have been filed against the common order dated 17/10/2000 made by the learned Single Judge in First Appeal No.564 of 2000 and First Appeal No.779 of 2000. The appellants in both these Letters Patent Appeals are original plaintiffs of Special Civil Suit No.109 of 1998 in the Court of Civil Judge (Senior Division), Bhuj. The parties shall be referred hereinafter as per their respective description in the suit.

2 The plaintiffs had filed the suit seeking declaration that as they were holders of plot of land bearing no.53 allotted to them by defendant no.1 (GIDC), the plaintiffs were having priority to be allotted plot of land on the southern side of the plot held by the plaintiffs; a further declaration to the effect that GIDC cannot allot the said plot to anyone else overlooking priority of the plaintiffs and that the said plot of land should be allotted to the plaintiffs after charging the fees as per Rules; a further prayer was also made that the defendant No.1 cannot close the road on southern side of plot no.53 held by the plaintiffs nor transfer the said land to any one else. It was also prayed that the plaintiffs are having access both from the northern side and southern side of plot no.53 and defendant No.1 - GIDC should be restrained permanently from preventing the plaintiffs from using the said access. It was also prayed that the defendant GIDC should be injuncted from parting with the plot of land on the southern side of plot no.53 in favour of any other person in any manner whatsoever.

3 Defendant No.1-GIDC filed its written statement and stated that the said plot of land bearing no. 162 on the southern side of the plot of the plaintiffs had already been allotted to one Arihant Tade Link. The plaintiffs therefore sought permission to implead the said party as defendant no.2 and the prayer having been

granted, defendant no.2 came to be joined as a necessary party. The pleadings were completed, the suit was finally heard and decided after taking evidence and decreed in favour of the plaintiffs. It is an admitted position that no prayer seeking any relief against defendant no.2 was made by the plaintiffs even after impleading the said party as a necessary party.

4 GIDC-defendant No.1 preferred First Appeal No.779 of 2000 being aggrieved by the judgment of the Trial Court rendered on 23/5/2000 and defendant no.2 preferred First Appeal No.564 of 2000 against the said judgment.

5 The appellants (original defendant nos. 1 & 2) at the hearing of the First Appeals raised contentions which the learned Single Judge has summarized in the following terms :

"3. The appellants in the respective appeals contended that :-

[i] The issues raised by the trial Court in the suit go beyond and outside the scope of the pleadings of the plaintiffs as presented in the plaint;

[ii] That the findings of fact recorded on such issues are also based on evidence permitted to be led by the trial Court, which could not have been permitted looking to the averments made by the plaintiffs in the plaint; and

[iii] The decree passed by the trial Court goes beyond the prayers made by the plaintiffs in the prayer clause contained in the plaint."

It was held that "on these contentions as a result of the hearing and discussion, it becomes plain that these contentions require to be upheld". Accordingly, the judgment and decree were held to be unsustainable "in view of the case put up by the plaintiffs in the plaint, and in the light of the contentions raised by the defendants in their written statements".

6 The learned Single Judge thereafter goes on to record that the Counsel for the original plaintiffs sought leave to amend the plaint by presenting Civil Application No.9528 of 2000. The Court quashed and set aside the judgment and decree of the Trial Court and remanded the case to the Trial Court under Order 41 Rule 23A of the Code of Civil Procedure 1908 for a fresh decision on merits. Thereafter, various directions have been given to the parties and the Trial Court in paragraphs 8, 9 & 10 of the impugned order.

7 Mr.Sanjay Ratansing Thacker, plaintiff no.1 and power of attorney holder of plaintiff no.2 has appeared in person in these Letters Patent Appeals and it is submitted that the order of remand made by the Court was not justified on facts of the case and the matter was required to be decided on merits. It was submitted that even if the amendment as prayed for and granted and carried out in the plaint is permitted to remain on record there was no occasion for the Court to quash and set aside the judgment and decree of the Trial Court and the Court ought to have finally decided the matter on merits after hearing the parties. That, at no stage a prayer for remand was made on behalf of the plaintiffs. That, in fact none of the contesting parties had prayed for remand. The party-in-person read extensively from the judgment of the Trial Court to contend that the case of the plaintiffs was primarily based on the circular of GIDC under which a plot holder became entitled to claim priority for allotment of adjoining plot. That, the plaintiffs had stepped into the shoes of their late father, who was the original allottee of plot no.53 in GIDC Estate, Gandhidham and had executed a lease deed on 30/10/1971 for a period of 99 years. That, the original allottee had made an application for allotment of open land on the southern side of plot no.53 in 1974 and thereafter various reminders were made on 15/11/1980, 28/4/1989, 18/4/1989, 31/7/1990 and 15/11/1990 but GIDC had not responded. It was in these circumstances that the plaintiffs were required to approach the Civil Court seeking reliefs as prayed for. It was further submitted that considering the evidence which had come on record the Trial Court had rightly decreed the suit in favour of the plaintiffs and the learned Single Judge had erred in quashing and setting aside the judgment and decree of the Trial Court without appreciating the evidence which had come on record.

8. Mrs.Ketty A.Mehta, learned Counsel appearing on behalf of original defendant no.2 (appellant of First

Appeal No. 564/00) raised a preliminary objection as to the maintainability of the Letters Patent Appeal. The said objection was also raised as a preliminary ground by Mr.G.D.Bhatt on behalf of GIDC (appellant in First Appeal No.779/00). In support of this contention it was submitted that there was a distinction between right to appeal and procedure of appeal and once the procedure of appeal had been omitted, in light of the amendment/substitution of Section 100A of the Code of Civil Procedure by the Code of Civil Procedure (Amendment) Act,1999 (Amendment Act 1999) read with the Code of Civil Procedure (Amendment) Act,2002 (Amendment Act2002), the present appeals filed by the plaintiffs were not maintainable. It was submitted that by virtue of conjoint reading of Section 10 and Section 32(g) of the Amendment Act 1999, it was clear that no Letters Patent Appeal would lie where any appeal from an original or appellate decree or order is heard and decided. Similarly, considering the provisions of Sections 4, 15 & 16 of the Amendment Act 2002, it became abundantly clear that no Letters Patent Appeal would be maintainable even against the judgment and order of the learned Single Judge except in cases wherein petitions under Articles 226 or 227 of the Constitution of India were heard and decided. It was further submitted that as the pending Letters Patent Appeals were not saved from the applicability of Section 100A the said amended provision would apply to pending proceedings and these appeals therefore could not be entertained as the procedure of appeal had been omitted. That, there was a real distinction between an omission of provision and repeal and the consequences of an omission would be that all pending proceedings would also be covered and could not be proceeded with. It was further contended that while the saving provision was made in respect of Second Appeals from a decree in a suit for recovery of money not exceeding twenty five thousand rupees already admitted before the commencement of Section 5 of the Amendment Act 2002 by which Second Appeal was not barred there was no such saving made in respect of the pending Letters Patent Appeals and omission of such saving would indicate that Section 100A barring Letters Patent Appeals was applicable even to the pending Letters Patent Appeals. Referring to Section 32(2)(f) of the Amendment Act 1999 similar contention was raised that the amended Section 96 was specifically made inapplicable to appeals already admitted before the commencement of Section 9 of the Amendment Act 1999 by which in Section 96 for the words "three hundred rupees", the words "ten thousand rupees" were substituted.

9. The following decisions were referred to and relied upon in support of the aforesaid propositions :

9.1 Kolhapur Canesugar Works Ltd. and Another Vs. Union of India and others, AIR 2000 SC 811 for the proposition that Section 6 of the General Clauses Act only applies to repeals and not to omissions and applies when the repeal is of a Central Act or Regulation and not of a Rule. Special emphasis was laid on paragraphs 33 & 35 of the said judgment to contend that provisions of General Clauses Act,1897 could not be invoked to save the pending appeals.

9.2 The next decision was in case of Shiv Shakti Coop. Housing Society, Nagpur Vs. M/s.Swaraj Developers & Others, 2003(4) SCALE 241 with special reference to observations in paragraph 33 of the said judgment to contend that if a provision of statute is unconditionally omitted without a saving clause in favour of pending proceedings, all actions must stop where the omission finds them.

9.3 The next decision was a decision of this Court in case of Kiran Jayantilal Thakore, Pro. of Ramkrupa Co.Op.Hsg. Soc.Ltd. Vs. Krishnakumari Chhajusingh, C/o.Sulekhram & Sons (2003) 2 GHJ 118, wherein the Court speaking through Hon'ble Mr.Justice J.N.Bhatt after setting out Section 100-A of the Code of Civil Procedure stated thus in paragraph 3 :

> "3. After having heard the learned advocate appearing for the parties and considering the aforesaid amended provisions of section 100-A of the Code, it becomes crystal clear that this Letters Patent Appeal is not maintainable".

9.4 Another unreported decision by Division Bench of this Court rendered in Letters Patent Appeal No. 170 of 1983 in case of Kamal Mangaldas Vs. Skyways Autopac decided on 25/6/2003 taking the same view was also cited.

10. On merits it was submitted by Mrs. Mehta that the Trial Court had gone beyond the pleadings made and the reliefs sought ignoring the factum of allotment of plot no.162 having already been made in favour of defendant no.2 and possession in consequence thereof having been granted in favour of defendant no.2. It was submitted that though defendant no.2 had been impleaded as a necessary party no relief had been sought against defendant no.2 and in the circumstances the Trial Court

could not have passed the decree in the manner it did. That, it was in the aforesaid context that the judgment and order of the learned Single Judge had to be appreciated when the judgment and decree of the Trial Court were quashed and set aside. That the remand had been made in light of the Civil Application for amendment moved by the plaintiffs before the learned Single Judge. That, fresh triable issues arose in light of the application for amendment wherein malafides and collusion had been alleged against the defendants. That, these were questions of fact which could not be decided without evidence being brought on record and there was no error in the impugned order which calls for any interference.

11. It was further submitted that even otherwise the impugned order dated 17/10/2000 had been exhausted in as much as the amendment had been carried out by the plaintiffs before the Trial Court, defendant no.2 had already filed its written statement in relation to such amendment and in these circumstances, the suit before the Trial Court should be permitted to be proceeded with. In relation to the claim of priority for allotment by the plaintiffs the submission was to the effect that defendant no.2 also could make a similar claim and for this purpose also it was necessary that defendant no.2 should be given an adequate opportunity to present its case and lead evidence in this regard. It was also submitted that the entire case of the plaintiffs in the present appeals was on the basis that, amendment was not necessary, but, the plaintiffs should not be heard on this count as they were represented before the learned Single Judge by an Advocate and the Civil Application for the amendment had been presented by Advocate in good faith and the plaintiffs should not be permitted to disown the same at this stage.

12. Mr.G.D.Bhatt, learned Advocate appearing on behalf of defendant no.1-GIDC adopted the submissions made in relation to maintainability of appeal and submitted that it was necessary to take into consideration the backdrop in which the Civil Application for amendment came to be moved on behalf of the plaintiffs before the learned Single Judge. It was further submitted that taking into consideration that there were contesting claims for the same plot of land, situated on the southern side of plot no.53 held by the plaintiffs, it was necessary that GIDC be permitted to take an independent decision based on its own rules and/or regulations and circulars for determining as to who would be entitled, even if for the sake of argument priority could be stated to be a factor requiring

consideration. It was therefore submitted that, in any event the order of remand did not call for any interference as the entire matter was at large before the Trial Court and would not cause prejudice to anyone.

13. The party-in-person in response to the preliminary objection regarding maintainability of appeal submitted that the provisions do not stipulate any retrospective operation and hence could not be applied retrospectively in case of appeals which were already filed and admitted before the amendment came into effect. In support of the aforesaid submission reliance was placed on Full Bench decision of this Court in case of Nasik Hing Supplying Company Vs. Annapurna Gruh Udyog Bhandar, 2003(2) G.L.R.926. On merits it was submitted that if the order of remand was only because of the application for amendment, such an amendment,even though sought for and carried out was not necessary and hence the order of remand was uncalled for. As regards the submission that as fresh triable issues arose remand became necessary, it was submitted that in case of Santokh Singh and another Vs.Mahant Iqbal Singh, 2000 AIR SCW 3435 in almost a similar factual matrix the Apex Court had held that absence of the necessary prayer was only a defect and the same could be cured by way of an amendment by incorporating such prayer at any stage.

14. The aforestated preliminary submission as regards maintainability of appeal is erroneous because Section 16(2)(a) of the Amendment Act 2002 and Section 32(2)(f) of the Amendment Act 1999 are provisions made without prejudice to the generality of the provisions of Section 6 of the General clauses Act,1897. Therefore, the Letters Patent Appeals already admitted and pending at the time when Section 100A as substituted by Section 4 of the Amendment Act 2002 came into force, or even Second Appeals in which monetary limit as specified by Section 5 of the Amendment Act 2002, is not breached, such Second Appeals already admitted and pending at the time when the Amendment Act 2002 came into force would not only survive and are saved but would be maintainable.

15 In the decision of Shiv Shakti Cooperative Housing Society (supra) the Apex Court has in paragraph 13 considered the respective scope of appeal and revision and in this context stated that "It is fairly a well settled position in law that the right of appeal is a substantive right." It is further observed in paragraphs 16 and 17 that an appeal is essentially continuation of

the original proceedings and the provisions applied at the time of institution of the suit are to be operative even in respect of the appeals. That is because there is a vested right in the litigant to avail the remedy of an appeal. That in case where vested rights are involved, a legislation has to be interpreted to mean as one affecting such right to be prospectively operative. The right of appeal is a statutory right. The appeal strictly so called, is one in which the question is, whether the order of the Court from which the appeal is brought was right on the materials which that Court had before it. In effect the entire proceedings are before the appellate authority and hence it carries with it a right of rehearing on law as well as fact unless the suit conferring the right of appeal limits the rehearing in some way".

16 The Full Bench of this Court in case of Nasik Hing Supplying Company (supra) has taken into consideration the amendments made in Section 100A along with Sections 96 & 100 as well as 104, 106 & 108 of the Code of Civil Procedure as well as the scope of provision of Clause 15 of the Letters Patent Act, and summarized the position in paragraph 12 of its judgment. For the present purpose it is necessary to reproduce the relevant summary at page 938 :"(b) Where a first appeal is decided on or after 1-7-2002 by a Single Judge of this Court from original decree or order, no further appeal under the Letters Patent shall lie before the Division Bench of this Court".

17 Therefore, in light of the aforesaid settled legal position, once the right of appeal which is a statutory right has vested prior to the amendment coming into force viz.1/7/2002, the said right would be available to the appellants and it is not possible to accept the preliminary objection that the present appeals are not maintainable.

18 On merits, it is necessary to consider the basic fact that primarily the dispute was between the plaintiffs and the GIDC, which was the only defendant when the suit came to be instituted. Defendant no.2 came to be impleaded only after GIDC had filed its written statement claiming that plot no.162, situated on southern side of plot no.53 held by the plaintiffs, had already been allotted to defendant no.2. The grievance on behalf of defendant no.2 that there were no pleadings in relation to such allotment in favour of defendant no.2, nor was there any prayer seeking any relief against defendant no.2 loses sight of the fact that plot of land

which was in dispute was owned by GIDC and the plaintiffs were seeking that the same be leased out to the plaintiffs by GIDC. The learned Single Judge states in para 2.1 that a number of grounds were raised and orally urged before him by the defendants but the same are not discussed by simply observing: "that the first contention raised by the appellants requires serious consideration and also requires to be allowed". Thereafter, the learned Single Judge has merely reproduced in paragraph 3 the contentions raised by the appellants before him, viz. the defendants, and held that the said contentions require to be upheld without giving any reasons for such a sweeping finding. As to how the issues raised by the Trial Court in the suit go beyond and outside the scope of pleadings of the plaintiffs, or why the findings of fact recorded on such issues based on evidence permitted to be led by the Trial Court, could not have been permitted by the Trial Court, and how the decree passed by the Trial Court goes beyond the prayers made by the plaintiffs is not at all spelt out. In fact, except for reproduction of the contentions and concluding that the contentions require to be upheld no reasons whatsoever are forthcoming in the impugned order.

18.1 The least that can be stated is that the Division Bench is deprived of the benefit of appreciating what weighed with the learned Single Judge while arriving at such a decision. Reasons, howsoever brief, are the soul of an order/judgment. As per settled legal position, in an appeal the question that is required to be answered is : whether the order of the Court from which the appeal is brought was right on the materials which that Court had before it ? In the present case, the answer is an emphatic no, as demonstrated hereinafter.

19. The issues framed by the Trial Court, especially issues 2A & 2B specifically arise out of the pleadings before the Trial Court, as can be seen from a bare reading of the pleadings and the Trial Court has permitted evidence to be led in regard to the same and then decided the same. The principal relief that was prayed in the suit by the plaintiffs was as regards allotment of plot no. 162 in favour of the plaintiffs on priority basis. Though in the written statement it is denied on behalf of GIDC, that no applications as averred by the plaintiffs were received by GIDC, it has come on record through the deposition of Shri Pillari Shetty, Regional Manager of GIDC, that there were no rules/regulations to seek deposit along with the application for allotment of plot prior to 1982 and that

if the application was not in proper form, GIDC would send it for completion to the applicant and enter into correspondence. It is not necessary to elaborately deal with the evidence in light of the view that we are taking but the aforesaid is being pointed out only to show that the 'lis' was between plaintiffs and GIDC and necessary evidence, both oral and documentary, did come on record before the Trial Court. Circular letter dated 1/6/1993, Ex.106 was produced on 4/2/2000 along with a list of documents before the Trial Court and there is an endorsement by the respective Advocates of both defendant nos. 1 and 2 that they had no objection if the documents listed therein were exhibited. As stated in paragraphs 2 and 3 of the circular, an allottee of an existing plot is entitled to priority in allotment of adjoining plot for the purpose of expansion of an existing unit. There are other categories also mentioned which are preceding as well as succeeding the category specifying an existing plot holder. The Trial Court has also taken into consideration letter by Divisional Manager addressed to the Regional Manager of GIDC wherein it is stated that the plaintiffs have staked their claim for the plot on the southern side of plot no.53. The said letter dated 23/4/1989 is at Exh.90.

20. It has come on record that defendant no.2 had submitted an application for allotment on 13/2/1998 and the allotment came to be made on 19/2/1998 and the possession of the plot was handed over within four days after obtaining approval of the Managing Director of defendant no.1 - GIDC. Though it is an admitted position that plot no.162 on the southern side of the existing plot of the plaintiffs was falling in green belt the conversion into industrial belt took place on 21/2/1998 after an application in this regard came to be moved on 15/2/1998. Therefore, prima facie it appears that the application for allotment by defendant no.2 and allotment in favour of defendant no.2 came to be made even before the proposal for conversion from green belt to industrial belt was made and sanctioned. It is in these circumstances that the Trial Court has found that allotment in favour of defendant no.2 by defendant no.1 GIDC was made in undue haste despite the fact that application of the plaintiffs had been pending since more than 16 years.

21. In the aforesaid fact situation, we are constrained to hold that the impugned order dated 17/10/2000 passed by the learned Single Judge remanding the matter to the Trial Court is bereft of any reason and even minimum facts which would be necessary for deciding

First Appeals arising from original decree. The impugned order including consequential directions dated 17/10/2000 cannot be permitted to survive in the circumstances and we quash and set aside the same. In light of the evidence which has already come on record it is necessary that the First Appeals are required to be heard and decided by the learned Single Judge on merits after hearing the contesting parties. We also make it clear that any discussion or observations as regards merits made hereinbefore are only with a view to ascertain prima facie whether the impugned order had dealt with the controversy between the parties or not.

22. In the result, the Letters Patent Appeals are accordingly allowed to the aforesaid extent. There shall be no order as to costs. The order of interim relief which has continued throughout shall continue until further orders that may be made by the learned Single Judge in the First Appeals.

Sd/-
(R.K.Abichandani, J)
Sd/-
(D.A.Mehta, J)
m.m.bhatt